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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 667

ANNISTON MANUFACTURING COMPANY,
A CORPORATION,
Petitioner,

vs.

HARWELL G. DAVIS, COLLECTOR OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FILED BY THE UNDERSIGNED AS AMICUS CURIAE.

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Brief filed by George T. Buckingham as *amicus curiae* in the above entitled case.

STATEMENT OF FACTS.

A detailed statement of facts is contained in the Petitioner's Brief. In explanation of this suit, only the following statement need be made:

The petitioner is a processor from whom, under the pretended authority of the Agricultural Adjustment Act, a considerable amount of money was collected as processing and floor stocks taxes. At the time of the payment of this money, the Act contained a provision expressly making applicable the general statutes relating to the refund of all Federal taxes. These statutes (R. S., Sections 3226 and 3228) required merely the filing of a claim with the Commissioner of Internal Revenue, and the rejection of such claim or the expiration of a period of six months, as a con-

dition precedent to the bringing of suit against the Collector. In accordance with these statutory requirements, proper claims for the monies herein involved were filed by petitioner with the Commissioner of Internal Revenue, and after the rejection of these claims, the present suit was instituted against the Collector who had illegally exacted payment of these monies. The filing of the claims and their rejection and the institution of the present suit, all were accomplished prior to the enactment by Congress on June 22, 1936, of the Revenue Act of 1936.

The United States District Court for the Northern District of Alabama sustained the defendant's motion to dismiss. This judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit but on an entirely different ground.

SCOPE OF ARGUMENT.

We discuss in this brief only two propositions:

I. Title VII is unconstitutional either because of indefiniteness or because the criteria on which refunds may be denied are wholly arbitrary and unreasonable.

II. The validity of Title VII of the Revenue Act of 1936 is not determined by the case of *United States* v. *Jefferson Electric Manufacturing Company*, 291 U. S. 386.

These propositions are unconnected. We discuss the first in order to make clear the utter inadequacy of the vague and illusory provisions which Title VII offers to the taxpayer as a pretended substitute for the unequivocal vested right which it attempts to destroy. We consider the *Jefferson Electric* case only because it was made the basis of the District Court's adverse opinion and not because it has any real relevance to the issues involved in the instant case.

I. TITLE VII IS UNCONSTITUTIONAL BECAUSE OF INDEFINITENESS AND BECAUSE THE CRITERIA ON WHICH REFUNDS MAY BE DENIED ARE WHOLLY ARBITRARY AND UNREASONABLE.

In the case at bar, petitioner is a taxpayer from whom monies have been unconstitutionally exacted under the color of taxation. Section 910 of Title VII attempts to destroy the taxpayer's right to recover these illegal exactions from the Collector. The unconstitutionality of this inseparable section of the Title has been briefed by Petitioner. Other sections of Title VII purport to provide that the taxpayer can obtain the refund of these illegally exacted taxes from the Government, but Section 902 attaches

a series of conditions which in fact bar all such refunds. The remainder of this portion of the brief will be devoted to a consideration of Section 902 and its supplementary provision, Section 907. These sections, which embody the pretended right of refund, will be demonstrated to be completely illusory and to afford no true relief either because of indefiniteness, or because the criteria on which refund *must presumptively be denied* are wholly arbitrary and unreasonable.

We shall not discuss the unconstitutionality of these provisions in that they establish requirements which are manifestly impossible of legal proof. Nor shall we discuss the far-reaching implications of Title VII in its attempt to surround a vested right to restitution of an unconstitutional exaction, with a series of conditions that have the effect of ratifying the original illegal exaction. We do not consider whether Title VII is thus in effect a method of taxing where this Court has said that Congress cannot constitutionally tax. Nor shall we inquire into the evidence showing that the provisions of the Title have been palpably erected as a barrier to *any* refund by the Government. These points have been amply treated in other briefs.

We shall devote ourselves simply to demonstrating that the provisions of Sections 902 and 907, designed to bar refund of the tax, are either wholly uncertain and indefinite, or predicated upon considerations completely unrelated to the propriety of the refund so as to constitute the entire Title an unlawful deprivation of property within the meaning of the Fifth Amendment.

As we shall point out in a later section of this brief, this Court, in the case of *United States* v. *Jefferson Electric Company*, 291 U. S. 386, has recognized the principle that when a taxpayer has by agreement collected a tax *as a tax* from his vendee, Congress may direct the Commissioner and the courts to inquire into the existence of such a contract and may condition the granting of the refund on the

amount of the tax so collected being returned *to the vendee.* But under Title VII, as even the most casual reading discloses, the right to refund does not depend upon the existence or non-existence of any agreement between the taxpayer and his vendee, but rather upon the proof of certain facts as to the "shifting of the burden" of the tax. As will be later more fully explained, the principle of the *Jefferson Electric* case clearly bears no relation to a statutory provision that the refund of the tax to the vendor may be made to depend upon certain economic effects of the tax.

What then is the theory of Title VII? The Government maintains that it is simply that Congress may legislate to prevent "unjust enrichment." But how may Title VII be supported upon any theory of "unjust enrichment"? In the instant case the Defendant Collector unlawfully exacted from the Petitioner certain monies which were turned over to the Treasury of the United States. Can it be reasonably contended under any theory of "unjust enrichment" that either the Collector or the Government, in possession of monies *illegally exacted,* is entitled permanently to retain such monies, on the ground that to refund the monies to the taxpayer would unjustly enrich the taxpayer at the expense of a third party? Especially when no provision is made for any refund to that third party?

But let us, for the purposes of this brief, assume that Title VII may be justified upon the theory which the Government suggests; that, in other words, the equitable principle of "unjust enrichment" may be so distorted as to apply even where the alleged "unjust enrichment" arises not between the Government and the refund claimant, but between the claimant and a third party. Even with these assumptions we have admitted nothing with respect to the validity of Title VII. For, even if we grant what is probably the Government's major premise,

that Congress may legislate to prevent unjust enrichment as between a refund claimant and a third party, what must be the characteristics of such legislation? First, obviously, it must in some reasonably definite manner measure the extent of any unjust enrichment as between those parties. Secondly, it must provide that any portion of the refund which would result in unjust enrichment to the claimant must be restored to the third party.

To narrow the scope of the inquiry, we will not here argue the second requirement; since it is discussed in other briefs. We will confine ourselves merely to pointing out that Title VII, as a measure of any possible unjust enrichment, is not only hopelessly indefinite, but is wholly arbitrary and unreasonable.

A. Title VII Makes Any Refund Dependent Upon Indefinite and Ambiguous Conditions.

The Title is both complex and prolix, but the issue is relatively simple. The taxpayer, in seeking to recover these unconstitutionally exacted taxes, encounters both Section 902 and Section 907. The former requires that he must show in order to obtain a refund of any illegally exacted amount

> "That he bore *the burden of such amount* and has not been relieved thereof nor reimbursed therefor nor *shifted such burden* directly or indirectly * * *." †

The latter, Section 907, goes further and provides that, if certain facts exist, he will be presumed *either* to have borne "the burden of such amount" or to have "shifted such burden", and throws upon him the burden of disproving the presumption.

In examining these two sections, one must never lose sight of this fundamental fact: *They represent what is*

† Throughout this brief italics, unless otherwise noted, are supplied by the writer.

offered the taxpayer in lieu of his perfected vested right against the Collector which Title VII destroys. (This attempted destruction of a vested right is elsewhere shown to be clearly unconstitutional. We pass that issue here.) The refund provisions of Sections 902 and 907 must therefore be considered in the light of what they are to replace. The reasonableness of these complex provisions—offered as a substitute for a vested right but realistically intended to preclude all recovery—must be approached with this always in mind.

1. Section 902 Is Inherently Ambiguous and Uncertain.

The key to the question whether a definite and reasonable method is provided, must be found in Section 902. This prohibits the refund of any unconstitutionally exacted processing or floor stocks tax unless the claimant satisfies the Commissioner

> "(a) That he bore *the burden of such amount* and *has not been relieved thereof nor reimbursed therefor* nor *shifted such burden, directly or indirectly,* (1) through inclusion of such amount by the claimant, • • • in the price of any article with respect to which a tax was imposed • • •, or in the price of any article processed from any commodity with respect to which a tax was imposed • • •; (2) through reduction of the price paid for any such commodity; or (3) *in any manner whatsoever;* and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may *shift the burden* thereof; or
>
> "(b) That he has repaid unconditionally such amount to his vendee (1) *who bore the burden thereof,* (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever."

This is not the happiest or most exact language by

which to foreclose fundamental rights. Neither Section 902 nor any other provision of Title VII defines "shifting" or "passing on or back." Nor does it spell out the meaning to be given to "the burden". The basis upon which the Commissioner's determination must, in the first instance, be founded, is assuredly not certain and cannot be clearly found in Section 902. Compared with the clear right against the Collector to recover taxes illegally exacted merely by showing payment and denial of refund, the language of Section 902 enshrouds any possible refund in a cloud of impenetrable smoke.

What meaning can be attributed to it? It speaks both of "bearing" and "shifting" the "burden" of the tax. If this is to mean that the tax was shifted merely because the taxpayer received more for his finished product or paid less for his raw material during the tax period, we shall demonstrate later that these facts of themselves, even if provable (which we deny), bear no relation to any theory of unjust enrichment nor do they have any reasonable relation to the final effects of the tax upon the taxpayer. If, on the other hand, the vague language of Section 902 is intended to deal with the ultimate "incidence" or pressure of the tax, we do not here argue, but in another *amicus* brief it is clearly shown, that the eventual "incidence" or pressure of a tax completely eludes demonstration—even granting that any inquiry as to such "incidence" would be relevant in determining the propriety of a refund. Thus, the terms used in Section 902 can have, like the language of "Humpty Dumpty", any meaning which the Commissioner finds it necessary to give them. The latitude thus afforded the Commissioner, the Board of Review, or the courts, in barring a refund, is virtually limitless.

In short, Section 902 may mean either something which, even if provable, has no relation to any theory of unjust enrichment; or it may mean "incidence" of the tax which,

assuming that it is relevant, is wholly impossible of legal proof; or it may mean nothing. The only thing certain about it is that its meaning is uncertain, vague and ambiguous. Unless the Commissioner, his own Board of Review, or the courts, are to be given unlimited latitude *to legislate* and themselves determine the various circumstances under which a taxpayer—from whom monies have been unconstitutionally exacted and who has a clean-cut right to recover—can now get a refund, Section 902 represents little more than an indefinite and confusing attempt to preclude *any* recovery.

2. The Presumption Specified in Section 907 as a Supposed Method of Proof Throws No Light on the Meaning of Section 902.

It has been suggested, however, that the meaning to be given to this inherently ambiguous language of Section 902 can, by some mystic alchemy, be distilled out of Section 907. Let us look at that Section.

Section 907 first prescribes a *presumption* to be employed by the Commissioner in initially determining that the taxpayer did *not* "bear the burden of such amount". Without attempting to state in plain English what it is that must *ultimately* be proved, this section permits proof of certain arbitrarily selected economic effects to be made the basis for *presuming* that Section 902 is satisfied and the refund cannot be allowed. This does not throw any great light on what Section 902 means, nor can a presumption from particular evidentiary facts clear up ambiguity as to the meaning of the controlling ultimate fact. A presumption that one injured at a railroad crossing was exercising due care may be useful, but it does not throw any light on the entirely unrelated, but material, issue of the standard of care imposed upon the railroad. Or if a statute prohibited the selling of a commodity except

in "consumer-sized packages", and further provided that if the average margin per package sold remained unchanged, the seller would be *presumed* to have violated the Act, the presumption would certainly throw no light on whether a one, five or ten pound package was specified, nor would it cure the inherent ambiguity in the substantive prohibition.

This is perfectly illustrated by subsection (e) of Section 907. That subsection provides that the taxpayer may, if he can, rebut the presumption by introducing evidence as to the existence or non-existence of the economic effects giving rise to the presumption. But, the taxpayer may, in rebuttal, introduce not only such evidence, but may, in order to show that Section 902 is not applicable, introduce almost anything under the sun. For subsection (e) provides that rebuttal evidence may include testimony on the facts supporting the presumption "*but shall not be limited to*—" such facts. In other words, the *presumption* in Section 907 in no way confines the meaning to be given to Section 902, and any argument that the inherent vagueness of Section 902 is in any way cured by the later section, is completely met by subsection (e)—which says, in effect, that in meeting the presumption that Section 902 bars refund, there are no limitations (and likewise no clear directions) concerning other proof.

B. The Presumption Specified in Section 907 Not Only Improperly Throws the Burden of Proof on the Claimant, But Is Arbitrary and Unreasonable.

We have shown that under Section 907 proof of certain economic effects causes a *presumption* to arise that Section 902 is applicable to bar the refund. It has been seen that this presumption does not clarify what is to be proved. But Section 907 is important not only because it fails to clarify the basic defects in the substantive provision,

Section 902, but also because the presumption created is virtually *irrebuttable*, and is raised by a comparison of arbitrarily selected facts which bear no relation to the ultimate economic effects of the tax. Section 907 is thus of itself invalid, and invalidates Section 902.

Stated more simply, not only is the claimant, who prior to the enactment of Title VII had a clear and perfected right, confronted with a hopelessly vague standard, but Section 907 unreasonably creates a presumption, from arbitrarily selected and unrelated facts, that he cannot recover unless he can succeed in the impossible task of first explaining the ambiguities in Section 902 and then refuting the irrefutable. To extend an earlier metaphor, Section 902 creates an impenetrable smoke cloud of ambiguity: Section 907 tells the taxpayer that unless he can point precisely to where his own money is hidden in the smoke, he is not entitled to get it back.

Let us, however, examine the evidentiary basis on which this irrebuttable presumption can be raised. It is whether the average margin *per unit* between the "cost" and gross sales price of the commodity processed was or was not lower during the tax period than the average margin during the "period before and after the tax". For the purpose of determining any increase or decrease in this so-called "average margin", an elaborate formula is prescribed for comparison of the average margins *per unit* during the tax period with the margins during a two-year period prior to the imposition of the tax, and during the six-months from February to July, 1936.

1. The Factors Creating the Presumption Are Wholly Arbitrary.

In this jungle of unfamiliar concepts, it is important to understand, wherever possible, what the terms employed shall mean. The "average margin" is roughly the average difference between the *gross sales value per unit* of all articles processed during the "period of the tax" and the "*cost*" of such articles. Briefs filed by other *amici* demonstrate beyond the shadow of a doubt the wholly arbitrary character of the definition requiring that *sales value per unit* be calculated on a monthly basis, and the fantastic results that can be derived from applying either the actual or replacement cost formulae specified. We desire here simply to indicate that "*cost*" is not to mean cost as a business man knows it—including raw material cost, direct and indirect labor, overhead, etc—but merely the cost of the raw commodity. The processing tax paid on the processing of the particular commodity may, however, be added. Without delaying too long, it should be observed here that any increase in these other commonly accepted costs, such as increase through higher wages, greater overhead, diminution in plant utilization, etc., which anyone with the rudiments of business experience knows can equal and exceed the margin between raw material cost and selling price, are to be wholly disregarded. In other words, it is arbitrarily assumed that all costs, other than for raw material, remained constant.

Similarly, it is not necessary to demonstrate at length the arbitrary character of selecting for any and all businesses a particular two-year period prior to a tax* and a

* It is illuminating to observe that in Section 501 (f) (1) of Title III, which imposes a so-called "windfall tax" on somewhat the same theory or lack of theory, the "period before the tax" is taken as *six years*, not *two years*. This comparison strongly corroborates the suggestion that the selection of the two-year period in Title VII is founded on no real economic theory, and is at best an arbitrary guess. Compare *Senate Rep. No.* 2156, 74th Cong., 2nd Sess., p. 25.

In its Brief in the Circuit Court of Appeals for the Seventh Circuit in

six-months period following it. The existence during this two-year period of a world-wide depression, in which selling prices crowded down upon basic raw material costs and in which, in many cases, ordinary competitive sales were made under virtually distress conditions, is blithely disregarded in these required definitions.

In short, the presumption that refund will be precluded under Section 902 is raised by this arbitrary test: If the margin *per unit* between the *"cost"* of the raw material entering into a processed product and the selling price *per unit* of such product was equal to or greater than the same margin *per unit* during an arbitrarily selected prior period, the refund cannot be allowed. Thus, if an article selling at $1.00 had 40c worth of raw material in it during the period preceding the tax, and the same article selling at $1.50 during the tax period had 90c worth of raw material in it, the tax may not be refunded. In Petitioner's Brief it is amply demonstrated that this so-called presumption is in fact irrebuttable. We content ourselves with taking it for what it professes to be and showing that the facts on which it can be raised bear almost no relation to the question whether the taxpayer's position was or was not changed because of the illegal exaction.

Necessarily, the reasonableness of this practically irrebuttable presumption must be examined, that is, the validity

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Kingan & Co. v. *Smith, Collector*, No. 6118, the Government stated in respect to the six-year period in Title III:

> "Section 501 (f) defines average margin to mean the average difference per unit between cost of the commodity and the selling price of the articles processed from it *over a representative period prior to the imposition of the tax*. To insure that this comparison is wholly fair to the taxpayer, the *representative period* consists of the *six taxable years* prior to the imposition of the tax. Section 501(f)(1). In the case of the appellant this includes two years (1927-1928, 1928-1929) at the peak of the business cycle, two of receding activity (1929-1930, 1930-1931) and two at the trough of the cycle (1931-1932, 1932-1933." (p. 87)

If six years are so truly representative, are the two "trough" years alone equally representative?

of providing that, in the absence of anything else the meaning of which can be captured or defined, the fact that the average margin *per unit* between *selling price* and *cost* remained the same is sufficient to support a denial of the refund.

2. The Average Margin Per Unit Formula Is Not Determinative of the Tax Burden and Does Not Show "Who Paid the Processing Tax."

We have already seen that the extraordinary definitions of "cost" exclude direct and indirect labor costs, overhead, and other cost factors which ordinary business sense indicate should be included. Likewise, we have pointed out the arbitrary selection of a prior comparative period which, of itself, would suffice to render these so-called presumptions wholly arbitrary. But, going right to the heart of the problem, it is demonstrable that consideration only of the spread between the *cost* and *selling price* of a *single unit* is completely inadequate to determine where, in the commonly accepted economic terminology, the "incidence" of the tax finally fell.

(a) *Lack of Change in Average Margin, Reflecting an Increased Selling Price Per Unit, Does Not, in the Absence of a Fixed Demand, Indicate Greater Total Revenues.*

It is perhaps a commonplace that in a competitive market higher prices do not necessarily mean that the seller can market the same total quantity of products and thus secure larger total revenues. This fundamental economic fact invited inquiry in connection with processing taxes long before the passage of Title VII. Obviously, the Agricultural Adjustment Administration was interested in the question. In its report to Congress in 1934, the Agricultural Adjustment Administration stated that

> *"The question 'who pays the processing tax' cannot*

be answered by a mere examination of the change in producer, wholesale and retail prices and in the final spread between them. It is true that commonly this question is answered in this partial way without taking into account such facts as the volume of supplies, the rate of consumption, the amounts paid by consumers, the total returns to producers, the benefit payments made to producers from the proceeds of the processing tax, the stimulus to general business activity through increased farm purchasing power, and the improvement in the credit structure of the country through the enhancement of agricultural values." (Agricultural Adjustment, p. 220.)

The inter-relation of supply and demand and price upon the amount of goods that can be marketed has been very clearly stated by Secretary Wallace in a recent announcement concerning the new proposed sugar processing tax. He said

> "Since in most instances the total cost of production (including duties and taxes) tends to be related to selling price, there is generally assumed to be a direct causal relation between cost and price; *but in fact the cost of production affects price only indirectly through its effect on supply.* If the costs of production exceed price, there is a tendency for production to decrease, and the decreased supply causes an increase in price. *Thus it will be noted that the quantity of the supply, and not the cost of production, is the direct causal factor in determining price;* and factors other than cost of production—in this case quotas—can supersede cost of production in determining supply, and hence in determining price."

This clear statement strikingly indicates the fundamental fallacy in Section 907 and its basic injustice in employing merely the average margin *per unit* between *cost* and *selling price.* In other words, if any processor raises the price of the finished product, he cannot, of course, expect to sell as large a quantity unless there is a fixed demand. This axiom of marketing is completely ignored in Section 907. If, because of the processing tax the average sales price

per unit were increased, the number of units sold would ordinarily decrease. More low-price automobiles can be sold than high-price automobiles, and even if the margin on an automobile were tremendously increased because of the higher selling price, it does not at all follow that the manufacturer in question would be better off. This simple rule, completely ignored in Title VII, was so well understood by the economic advisers to the Agricultural Adjustment Administration and other Government economists that further brief illustrations can best be drawn from their own writings. Messrs. Ezekial and Bean, Economic Advisers to the Agricultural Adjustment Administration, have written that

> "The extent to which prices to consumers can be raised depends upon the consumers' willingness and ability to pay a higher price without reducing purchases." (Ezekial and Bean, *Economic Basis for the Agricultural Adjustment Act*, p. 59.)

In the case of cotton, purchases are immediately reduced by a rise in price since the demand for cotton textiles is in economic terminology exceedingly "*flexible.*" Thus, the Agricultural Adjustment Administration in its report in 1934 itself stated:

> "From the relation of domestic cotton consumption to cotton prices and to business activity during the last 13 years, it is estimated that the processing tax, if all passed to consumers, might reasonably be expected to reduce domestic consumption for the season around 400,000 to 500,000 bales from what it would have been without the tax." (*Agricultural Adjustment*, p. 239.)

That consumption was in fact reduced by the tax is indicated by a recent study published by the Brookings Institute in which the author, commenting on the relation between cotton prices and consumption, offers the generalization that

> "This relationship indicates that removal of the processing tax in 1933-34 would have caused an increase in consumption of cotton in the United States of 455,000 bales, and that if our cotton program had not been un-

dertaken and farm prices had averaged 6.4 cents per pound, consumption of cotton in the United States would have been 880,000 bales larger than it was." (Richards, *Cotton and the AAA*, p. 379.)

It is apparent, therefore, that if a cotton processor had been free to raise the price of his finished articles to his vendees, he would have sold less of his product. The processor's problem, of course, was individually to fix his price within the limits of competition at the point where the maximum net profit might be expected. But he did not thereby relieve himself from ultimately paying the tax, if that expression is to be given any real meaning.

(b) *Lack of Change in Average Margin Per Unit Does Not Reflect Effects of Higher Prices and Contracted Markets.*

Economists seem fairly unanimous that the imposition of a tax, resulting as it does in the rise in the cost of production, tends to force out of business the marginal producer. There seems general agreement that the imposition of the Agricultural Adjustment Act resulted in the insolvency of many smaller processors. To such an enterprise the consequences of the tax cannot be measured by a mere consideration of changes in the margin *per unit* during the tax period. To refuse a refund of the tax money illegally exacted, merely on the ground that such a business may have raised the price of its finished articles along with the general market, or paid a somewhat lower price for its raw materials, is obviously arbitrary and unreasonable.

With the general contraction of demand during a period of depression and the consequent increased overhead *per unit*, it was incumbent upon processors selling in a competitive market to maintain and, if possible, to increase demand. The processing tax necessarily saddled

the processor with additional costs. To conclude merely from his ability to maintain the average margin *per unit* between raw material cost and selling price that the processing tax left his position unchanged, is virtually to assume without warrant that demand remained constant. This not only is wholly fallacious and unreasonable as an economic theory, but as has already been seen is also contrary to fact.

(c) *Lack of Change in Average Margin Per Unit Does Not Reflect Losses Through Invasion By Untaxed Competing Commodities and Their Products.*

Related to the loss of sales which ordinarily follows an increase in prices in a competitive market is the temporary or permanent loss of markets to competing products manufactured from untaxed commodities. This well known business fact was not entirely disregarded even in the original Agricultural Adjustment Act. For Section 15 (d) of that statute authorized the imposition of so-called "compensating" processing taxes on any competing commodity where the Secretary found that the taxed commodities or their products were suffering disadvantages in competition because of "excessive shifts in consumption." A very brief history of the use of this Section illustrates not only that increased prices occasioned by processing taxes may cause an invasion by competing untaxed commodities, but also indicates the impossibility of measuring the burden of such shifts. It likewise demonstrates that where products sold compete on a functional rather than a style basis, such shifts are likely to be fairly rapid, closely dependent upon selling price, and possibly irretrievable. We need not argue that the agricultural commodities subject to processing taxes were largely manufactured into staple products, principally articles of food or ordinary wear, in which

use rather than style is the predominate consumer consideration.

Curiously enough, the compensating tax provision in the Agricultural Adjustment Act was operative only where "excessive shifts in consumption" were to be found. Within a very few months after the promulgation of the cotton processing taxes, the Secretary was asked to consider the loss of markets for cotton products and to impose compensating taxes on products of paper, rayon, jute and other vegetable fibres. Extensive hearings were held in July and August, 1933, but after months of study the Secretary could not make up his mind. The cotton textile industry continued to complain of severe losses of markets. In October, 1933, further extensive investigations and hearings were held which resulted in the imposition of compensating taxes on various paper and jute products. Few were satisfied with the results of these investigations. The cotton textile industry was insistent that large segments of its markets had been lost. The industries upon which compensating taxes had been placed shortly discovered that they in turn were losing their markets to other commodities not subject to compensating taxes. Frequent re-examinations and revisions and exemptions were necessary throughout the period of the tax. We need not explore the detailed repercussions of this activity in respect to cotton and products competing with it, for it is generally admitted that the shifts caused and the readjustments attempted occasioned changes and losses in the marketing of all the commodities involved that still persist.

In the case of the processing tax on hogs, not even limited attempts at correction were successful. Increased prices occasioned largely by the tax resulted in elaborate investigations by the Secretary. It was demonstrated that in place of purchasing higher priced pork products, the consumers were turning to other foods. But all efforts

definitely to discover just where and to what extent admittedly large market sales of pork products were seeping, proved unavailing. In turn, the inquiry was directed to beef, mutton, lamb, fresh fish, canned fish, poultry, eggs, etc. Certain it was that consumers were free to purchase lower priced foods and to a large extent were doing so. Whether such adjustments resulted in permanently changed purchasing and eating habits no one can tell.

All of this experience demonstrates the unreasonableness of saying that merely because the margin between the cost of the raw commodity and the average selling price *per unit* of a particular product manufactured from a taxed commodity remained unchanged, the processor's position was not affected by the tax. It likewise strikingly shows the utter injustice of *presuming* the conclusion against him and throwing upon him the burden of disproving such an unwarranted and irrebuttable presumption.

C. Title VII Is Unconstitutional Because It Deprives the Claimant of Property Without Due Process of Law.

In conclusion, passing all other questions of constitutionality, we have seen that the refund provisions of Title VII are offered to the taxpayer in lieu of his perfected vested right against the Collector which Title VII destroys. An examination of these refund provisions clearly shows that the conditions upon refund imposed by Section 902 are inherently ambiguous and uncertain, and afford to the Commissioner, his Board of Review, and the courts a degree of latitude which virtually would require them to determine for themselves the circumstances under which a taxpayer can obtain a refund. We have seen further that the presumption specified in Section 907, as a supposed method of proof, throws no light upon the meaning of the inherently ambiguous language of Section 902.

But even more strikingly, the *presumption* specified in Section 907 not only improperly throws the burden of proof on the claimant but is created merely by the comparison of arbitrarily selected facts which, even if provable, would bear no reasonable relation to the ultimate economic effects of the tax. The most cursory examination discloses that the definitions of the factors giving rise to the presumption are wholly arbitrary. In addition, these factors relate solely to the question whether the average margin *per unit* between selling price and cost remained unchanged. Both history under the processing tax and economic theory combine to prove that lack of change in average margin *per unit* does not indicate greater total revenues, does not reflect the effects of higher prices and contracted markets, and does not take into account losses through invasion by untaxed competing commodities and their products—in short, the average margin *per unit* formula is wholly unrelated to the real effect of the tax upon the taxpayer. As a complex substitute for a simple right to the return of an unlawful exaction, the conditions imposed are so vague and the irrebuttable presumption so unreasonable as to compel the conclusion that their real design is to bar any and all recovery.

II. THE VALIDITY OF TITLE VII OF THE REVENUE ACT OF 1936 IS NOT DETERMINED BY THE CASE OF UNITED STATES v. JEFFERSON ELECTRIC MANUFACTURING COMPANY, 291 U. S. 386.

In the case of *United States* v. *Jefferson Electric Company*, this Court decided that Section 424 of the Revenue Act of 1928 was a valid enactment. That provision is set forth in full in Appendix C, p. 37.

Briefly, Section 424 provided that no refund should be made of any automobile accessory tax until it was established that the taxpayer had not "collected" the tax from his vendee or, if he had "collected" the tax, had reimbursed, or would give bond to reimburse, his vendee.

A. By Treasury Regulations Under the Original Tax Act With Respect to Which the Refund Statute Considered in That Case Operated, Vendors Were Permitted to Collect the Tax from Their Vendees So Long as the Tax Was Treated as a Segregated Item.

To understand the opinion of this Court in the *Jefferson Electric* case, it is necessary to consider not only Section 424 but also the original tax act (Section 600 of the Revenue Act of 1924), the misconstruction of which made necessary the refund provision.

Section 600 of the Revenue Act of 1924 imposed a tax equal to 5% of the "sales price" upon the sale of "automobile accessories" to certain classes of customers. This tax was payable by the sellers, who were in the first instance the manufacturers, and the imposition of the tax necessarily increased their manufacturing costs. In view of this fact, the sellers desired, if possible, to secure the payment of the

tax by the purchasers, but this could not be accomplished simply by an increase in price, since any price increase would automatically increase the basis upon which the tax was computed.

The sellers, therefore, inquired of the Bureau of Internal Revenue whether they could "collect" the tax from their vendees without having to pay tax on the additional amounts received. In answer to these inquiries, the Treasury Department promulgated Regulations 47, in which it was indicated that the sellers might "collect" the tax from their vendees without causing an increase in the tax if, and only if, at the time of sale, they notified the purchaser that they were "collecting" the tax as an item separate from the selling price of the article.

These Regulations prescribed in detail that

1. The "tax" could be "passed on" or "shifted" only by a sales agreement between seller and vendee. "Passing on" and "shifting" could not be accomplished automatically, and in the absence of an agreement.
2. There must be a "sales price", as such, fixed and recognized by such agreement.
3. There must be a "tax" amount, as such, fixed and recognized by such agreement.
4. Both "sales price", and "tax" must be separate amounts, and must be so recognized and treated by seller and vendee, in the sales agreement.
5. In the absence of such a segregation in the agreement, "passing on" or "shifting" was legally impossible and could not be recognized.

In order to make these principles print plain, "examples" were given. It was pointed out (Regs., Secs. 4546-7, Appendix A, pp. 33, 34) that if a seller invoiced his sale as $100 for the "sales price" and $5 for tax, and thus received $105 from his vendee, then the seller had "shifted" the "tax burden", and would be required to turn over

to the Government only the $5 the seller had "collected" from the purchaser as tax.

But (Sec. 4549, Appendix A, p. 34) if the seller merely invoiced the article at $105, and said nothing to the vendee about tax, then the seller must pay $5.25 as tax, because in that event the $105 must be regarded as "sales price", distinct from any tax *buried* in it.

And to make the distinction so clear that none could mistake it, the Treasury Department, fully recognizing the distinction between (1) a sales tax which is "collected" from the purchaser *as a tax, i. e.*, paid by the purchaser in addition to the sales price; and (2) a tax which is one of the components of seller's cost and not separately dealt with, but, together with gas, oil, insurance, and hundreds of other cost items, in some *unmeasured* degree influences the sales price, reiterated (by Sec. 4552, Appendix A, pp. 34, 35) that the "underlying principle" involved in these "examples" is,

> *"that the price constitutes the basis for determining the tax, and must be specified."*
>
> *"As the price itself forms the basis for computing the tax, it is just as important that this item be mentioned, as that the tax be specified • • • in other words both price and tax must be designated and specified."*

B. The Distinction Made by These Regulations Between a Tax "Collected" as a Tax and One Buried in a Sales Price Is Also Evident in the Genesis of Section 424.

After these Regulations had been in force for a long time, there were several court decisions to the effect that taxes had been paid on certain articles which were not "automobile accessories" within the meaning of Section 600. It being apparent that, if these decisions were upheld, refunds would be payable to many manufacturers who

had availed themselves of the opportunity provided by the Regulations and had "collected" the tax from their vendees, the then Secretary of the Treasury wrote a letter to the Chairman of the Committee on Appropriations explaining the situation and suggesting a provision specifically relating to such refunds. The letter is set forth as Appendix B, p. 36. It was in response to this letter that Section 424 was enacted, as a part of the Revenue Act of 1928.

The letter shows that the selling price, and the tax, are considered as separate amounts, and that the Secretary had in mind only those cases in which the seller had *collected* the tax, as such separate amount, from the purchaser.

The letter, referring to the Regulations, discussed refunds "in these cases", *i. e.*, where the tax as a separate amount, distinct from the purchase price itself, had been collected by the seller from the purchaser. No other conclusion can be drawn from the language.

C. This Distinction Was Discussed and Accepted in Other Cases Prior to the Jefferson Electric Case.

The distinction illustrated by examples in the Regulations under Section 600 and clearly recognized in the Secretary's letter had been accepted and discussed by this Court long prior to the *Jefferson Electric* case.

In the case of *Lash's Products Co.* v. *United States*, 278 U. S. 175, this Court had occasion to deal with the refund of an illegal excise tax levied on sales of "soft drinks," which clearly presented this distinction. The tax was levied on "soft drinks, sold by the manufacturer," and the tax imposed was a "tax equivalent to ten per centum of the price for which so sold." The manufacturer sold cider for "the sum actually received by it for the goods sold."

The seller did not bill the tax as a separate item, and did not "collect" the tax from the purchasers, as a separate amount. It simply sold cider at a fixed price. But the seller "notified the customers beforehand" that it had paid the 10 per cent tax. The seller contended that by reason of this notice, it had "passed the tax on," that it should therefore only have been taxed on the selling price less the tax, and sued for refund of the difference.

This Court said, in rejecting the seller's contention (p. 176):

> "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. *Heckman & Co.* v. *I. S. Dawes & Son Co.*, 56 App. D. C. 213, 12 F. (2d) 154. *The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all.* • • •
>
> "*The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is part of the price,* and if the statute were taken literally, as there would be no reason for not taking it if it were now passed for the first time, there might be difficulty in accepting the commissioner's distinction *even if the tax were made a separate item of the bill.*"

Prior to the decision in *Lash's* case, the distinction which this Court made in its opinion in that case had been pointed out by Mr. Justice Cardozo, then Chief Judge of the Court of Appeals of New York, in the case of *Wayne County Produce Co.* v. *Duffy-Mott Co., Inc.*, 244 N. Y. 351. This case is of particular interest in that even in the absence of a statute it permitted a purchaser to recover from his vendor the amount of tax which had been refunded to the latter and which had been specified at the time of sale *as a separate item distinct from the sales price.*

The plaintiff had bought from the defendant a quantity of sweet cider, the price of which was stated to be 14½

cents per gallon, subject to a discount, plus the manufacturer's war tax of 10 per cent, which tax was to be paid in full without discount. After a determination that sweet cider was not subject to the tax, the amount paid to the Government was refunded to the seller. The purchaser then brought suit.

The court stated:

> "We think the plaintiff must prevail. *This is not a case where the item of the tax is absorbed in a total or composite price to be paid at all events. In such case the buyer is without remedy, though the annulment of the tax may increase the profit to the seller. Moore* v. *Des Arts*, 1 N. Y. 359. This is a case where the promise of the buyer is to pay a *stated price*, and to put the seller in funds *for the payment of a tax besides.* In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise. • • •
>
> "The contract therefore, in effect, was this and nothing more, that whatever moneys were necessary for the payment of a tax would be furnished by the buyer."

D. This Distinction Was Recognized in the Jefferson Electric Case.

In the light of the facts as to the origin of Section 424, the Regulations under Section 600 and the prior decisions involving similar questions, this Court in the case of *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, considered the validity of Section 424. A decision was reached and an opinion was written.

The decision, so far as it has ever been assumed to be relevant to the question at issue, was simply that Section 424 was valid, since it did not destroy the taxpayer's right to refund but merely made certain that the refund would go to the one who was in fact the actual taxpayer.

In discussing the case, however, this Court did not follow the phrasing of the Act but used language which had

apparently been suggested in the Solicitor General's brief. Thus this Court discussed the question raised by Section 424 in terms of whether the plaintiffs had "shifted" or "passed on" or "borne the burden" of the tax, stating that

> "If the taxpayer has borne the burden of the tax, he can readily show it." (p. 402)

This statement is itself clear evidence that the Court was concerned only with the question whether the taxpayer had "collected" the tax, *as a tax*, from its vendee, *for this was obviously the only fact which the taxpayer could "readily show."*

Elsewhere in its opinion this Court confirms this meaning beyond all possible doubt. In the *Jefferson Electric* Case the plaintiff's invoices had, during part of the taxable period, recited

> "On automotive accessories 1/21 of amount indicated herein equals 5% excise tax. 20/21 of amount indicated equal price."

As to this the Court said (p. 405):

> "• • • If by its invoices the plaintiff represented to its purchasers that the amount shown thereon included the tax as well as the selling price, and if it returned that amount less the tax as the selling price, and caused the tax to be computed on that basis, it can not be heard to say, in the absence of other controlling circumstances of which there is no finding, that it did not collect the tax from the purchasers but itself bore the burden thereof."

The American Chain Company, plaintiff in another suit heard and decided with the *Jefferson Electric* Case, had reduced its sales price by the amount of the tax and then stamped its invoices and bills so as to indicate that of the amount charged the customer, 1/21 part was for payment of the sales tax in question. Thus the purchaser paid no more than before, but the seller saved itself paying a tax upon a tax. This Court held (p. 409):

> "• • • It is of no importance that the prior sales

> price had been reduced by the amount of the tax, for under the taxing act the tax was to be computed on the price for which the articles actually were sold and not on some prior and discarded price."

In other words, this Court was not concerned with any evidence other than whether the taxpayer had segregated the tax as a separate item at the time of sale. Obviously then the sole consideration was whether the tax had been collected as a *tax* and not whether the taxpayer had borne any vague economic "burden."

When, therefore, this Court spoke in terms of whether the taxpayer had "borne the burden of the tax" or had "shifted the burden to the purchasers" it was clearly referring to the procedure established by the Regulations and recognized in prior decisions of this Court itself. If the taxpayer had not "collected" the tax—in the language of Section 424—or "shifted" the tax—in the phrasing of this Court—then obviously he could readily show this, since all that would be necessary would be a reference to the invoices used. And in the *Jefferson Electric* Case itself this was the only evidence considered.

E. This Distinction Has Been Consistently Upheld to the Present Day.

The distinction implicit in the *Jefferson Electric* case has been consistently recognized and upheld to the present day. Even so recently as December, 1936, it was set forth by learned counsel for the Government in their brief filed in the case of *Liggett & Myers Tobacco Co.* v. *United States*, October Term, 1936, No. 161, decided by this Court in favor of the Government on January 4, 1937.

In the *Liggett & Myers* case, the question for determination was whether tobacco sold to the Boston State Hospital was exempt from a Federal tax on tobacco manufactured in the United States and sold by the manufacturer. In arguing against the plaintiff's contention that such tax

was in effect, an imposition upon the State, counsel for the Government asserted that the tax did not burden the State since it was not a sales tax but was rather a tax on manufacture.

On page 16 of the Government brief it was asserted:

> *"The tax was a prior ordinary burden of taxation, and, like an income tax or a property tax, represented a part of the manufacturing cost, and attaching to the article prior to sale, it is not retroactively invalidated merely because a sale is later made. Cornell* v. *Coyne,* 192 U. S. 418. *The vendee neither directly nor indirectly paid the tax, as a tax, but paid a fixed price which might or might not have included the full manufacturing cost of the article including the manufacturing tax thereon.* Cf. *Lash's Products Co.* v. *United States,* 278 U. S. 175, 176."

The Government further argued (p. 27):

> "Should the Court, for any reason, rule against the Government, then, of course, only one of the parties petitioner can recover judgment. This is a case for the recovery of taxes alleged to have been overpaid. The tax is imposed upon the Liggett & Myers Tobacco Company. That Company is the only party recognized by the statutes dealing with refund claims and suits to recover. Any judgment against the Government should, therefore, be in favor of Liggett and Myers. *Indian Motocycle* v. *United States, supra; Panhandle Oil Co.* v. *Knox, supra; Builders' Club of Chicago* v. *United States,* 14 F. Supp. 1020 (C. Cls.). *Serious administrative difficulties might arise if parties other than the taxpayer were permitted to file claims and bring suit."*

It would appear that the Government's brief in this case contains the most recent and most eloquent advocacy of the distinction which we are now asking this Court to recognize.* And it is significant that this Court's decision in the *Liggett & Myers* case was in favor of the Government.

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* The case of *Casey Jones* v. *Texas Textile Mills, Inc.*, No. 8166, decided in January, 1937, in the Circuit Court of Appeals for the Fifth Circuit, is another recent discussion of that distinction. The Texas Mills paid processing taxes under the Agricultural Adjustment Act. It sold products

F. Title VII Is Not the Legal Equivalent of Section 424 Passed Upon in the Jefferson Electric Case.

The foregoing discussion of the *Jefferson Electric* case —the taxing statute there involved, the Regulations issued under it, the remedial legislation, and the decision of this Court—makes it abundantly clear that in that case the manufacturer-taxpayer had, by agreement, collected the tax from his vendee and that this Court recognized, and in later decisions affirmed, the distinction between so collecting a tax separate and apart from the sales price and merging the tax along with all other cost factors in the sales price.

The opinion of the District Court in the present case that the validity of Title VII is controlled by the opinion of this Court in the *Jefferson Electric* case, obviously ignores this basic distinction. For it is clear that the refund under Title VII is not conditioned upon the taxpayer having by agreement collected the tax from his vendee, but is made dependent upon whether the Commissioner decides that the taxpayer raised the *selling price* of the manufactured article or paid a lower price for his raw material. Section 902 pro-

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to a customer. The court held that there was *no contract* in force between the processor and the customer as to who would pay the tax, and that in the absence of such an enforceable contract, "*the tax was buried in the price*", and could not be recovered by the customer. The court said:

> "In sales of this kind, if the price agreed upon is understood by the parties to exclude the tax, and the buyer agrees to put the seller in funds for payment thereof, and later the seller is relieved of the duty of paying the tax, the buyer is entitled to recover the amount paid in excess of the price. *Wayne County Products Co.* v. *Duffy Mott Co.*, 244 N. Y. 351, 155 N. E. 689. However, if there be no agreement concerning the tax, no such right accrues to the buyer, even though the price paid includes a tax erroneously believed by the seller to be due. *Lash Products Co.* v. *United States*, 278 U. S. 175, 73 L. Ed. 251, 49 Sup. Ct. 100, citing *Heckman and Co.* v. *I. S. Dawes and Sons Co.*, 12 F. (2d) 154. *In the first case the tax is separate and apart from the contract price, while in the latter the tax is said to be buried in the price. These results have been reached in cases where the parties did not enter into any agreement concerning their rights in the event of the invalidity of the tax. Their intentions and obligations have been determined from the form of the transaction and the situation of the parties.*

hibits refunds unless the taxpayer can show to the satisfaction of the Commissioner

> "(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden directly or indirectly • • •".

The variety of meanings that can be given to this vague language and its basic ambiguity have already been discussed. But it is obvious even from a casual reading of the Title that the right to the refund has no relation to the existence or non-existence of any agreement relating to the tax between the vendor and his vendee, that is, to the segregation of the tax, *as a tax,* from the selling price. In short, in the *Jefferson Electric* case this Court was dealing with a segregated sales tax. In the present situation, to use the language of the Government's brief in the *Liggett & Myers* case, *supra*, "the tax was a prior ordinary burden of taxation and, like an income tax or property tax, represented a part of the manufacturing cost • • • attaching to the article prior to sale". While it is true that this Court did use the phrase "shifted the burden" in the *Jefferson Electric* case, it is a commonplace that the descriptive language in any opinion has reference solely to the facts involved in the case before the Court.

The *Jefferson Electric* case does not support Title VII. No support for that Title can be found in any decision of this Court.

Respectfully submitted,

GEORGE T. BUCKINGHAM.

APPENDIX A.

Regulations Under Sections 600-605.

REGULATIONS 47.
(Revised August, 1924)
Relating to
Excise Taxes on Sales by the Manufacturer
Under
Section 600 of the Revenue Act of 1924.

ART. 3. 4542. *Basis of Tax.* The tax is imposed on the sale by the manufacturer and should be returned and paid by him whether the sales price is actually collected or not. *It is measured by the price for which the article is sold* by the manufacturer and not by the list price where that differs from the actual sales price. If the price of a taxable article is increased to cover the tax, and the article is sold at such price, including the tax, the tax is on such increased price.

4543. The manufacturer may reimburse himself in the amount of the tax by agreement with the purchaser in the following manner: (a) by quoting the selling price and the tax in separate and exact amounts, and where invoices are rendered, by segregating these amounts on the invoices as outlined in examples (1) and (5) below; or (b) by stating to the purchaser in advance of the sale what portion of the quoted *charge* represents the price charged for the the article and what portion represents tax, and where invoices are rendered by invoicing in the manner outlined in example (2) below, in which case the amount of the tax need not be included in computing the tax.

4544. Where goods are ordered direct from the manufacturer with no agreement as to price, the tax is based on the amount billed or invoiced to the purchaser as the selling price. Mere statements or agreements that the quoted or contract price includes the tax do not operate to exclude any part thereof from tax, unless the price is billed in the manner outlined in example (1), (2), or (5) below.

4545. Where a lump sum is specified as the price of a taxable article or articles, and other articles not taxable and not a component part of the taxable articles are included in the price, the tax attaches to the entire amount unless the selling prices of the taxable and nontaxable ar-

ticles are segregated. In such case the tax will be measured by the price specified as the selling price of the taxable article or articles (examples 3 and 4). *The following examples illustrate the method by which the manufacturer may separate the tax from the selling price in invoicing goods to the purchaser:*

4546. EXAMPLE (1). A, THE MANUFACTURER, QUOTES A SELLING PRICE TO B OF $100 AND BILLS THE GOODS TO B AS:

"ARTICLE NO. 1, SELLING PRICE, $100; TAX, $5."

4547. EXAMPLE (2). A, THE MANUFACTURER, QUOTES A CHARGE OF $105, STATING THAT 20/21 OF THE CHARGE REPRESENTS THE PRICE AND 1/21 REPRESENTS THE TAX, BILLING THE GOODS TO B AS:

"ARTICLE NO. 1, CHARGE $105, 20/21 OF THE TOTAL REPRESENTS PRICE, AND 1/21 REPRESENTS TAX."

THE TAX IN SAMPLES (1) AND (2) IS COMPUTED ON $100; THE QUOTED AND ACTUAL SELLING PRICE.

4548. It should be noted that the above examples apply to articles taxable at 5 per cent. The same general principles apply where other rates obtain, though the fractions are used in example (2) would vary.

4549. Example (3). A, the manufacturer, quotes a selling price or contracts to sell goods at $105, including tax, and bills the goods to B as:

"Article No. 1, selling price, including tax, $105."

The tax is computed on $105, the quoted and invoiced selling price.

4550. Example (4). A manufacturer sells an automobile to B, including insurance, gas, and oil, and bills it as:

"One car, $2,150."

The tax is based on the full amount of $2,150.

4551. Example (5). If, in example (4) the invoice separates the charges into items as, "chassis $1,500, body $500, gas and oil $20, insurance, $30, tax $100," the tax is based on $2,000, the selling price of the chassis and body as specified.

4552. The underlying principle involved in examples (1) and (2) is that the price constitutes the basis for computing the tax and must be specified. *As the price itself forms the basis for computing the tax, it is just as important that this item be mentioned as that the tax be specified.* A manufacturer does not properly compute a 5

per cent tax on a sale at a *price* of $105, by taking 1/21 of that sum, even though he might say that the price was $105 and that 1/21 was tax. If $105 is designated as the price of an article, even though it be stated that such price includes the tax, the tax nevertheless applies to such entire price, and the fact that some part of it may be used to pay taxes affords no ground for concluding that the remaining portion, that is, the net proceeds of the sale after tax is paid, should form the basis for computing taxes. In case the manufacturer sells tires subject to a 2½ per cent tax, and desires to collect the tax in addition to the price, charging $40 as the price of the tires and $1 as tax, the terms of sale should show specifically that $40 is the price and $1 is tax, or he can indicate that $41 will be a charge made up of two items, 40/41 of the charge being the price and 1/41 being the tax; price lists; billings, invoices, etc., being made out accordingly. *In other words, both price and tax must be designated and specified.*

ART. 34. 4687. *Contract of sale before January 1, 1924, of Article Taxable under Section 900, 1921 Act, at Rate greater than Tax on same Article under Section 600, 1924 Act.* If before January 1, 1924, "A", a manufacturer of parts or accessories taxable at 5% under Section 900 of the Revenue Act of 1921, made a contract with "B", for the sale, after the tax takes effect, of an article taxed under Section 900 at a higher rate than that imposed by Section 600, and which included in the price stipulated in the contract the tax under Section 900 of the 1921 Act, and the contract does not permit the deduction from the amount to be paid of the difference between the tax at 5% under Section 900 of the 1921 Act and the tax at 2½% under Section 600 of the 1924 Act, "A" must refund to "B" so much of the amount of such difference as is not permitted to be deducted from the contract price. (See Arts. 30 and 36 as to credits for such refunds.)

APPENDIX B.

"My Dear Mr. Chairman: The revenue acts of 1918, 1921, and 1924 imposed an excise tax upon the sale by the manufacturers of certain automobile parts and accessories.

Under the regulations of the Treasury Department, a manufacturer was authorized to reimburse himself in the amount of tax paid by quoting the selling price and the tax in separate amounts and collecting the tax from the purchaser.

There have been several court decisions to the effect that certain articles, upon the sale of which a tax had been paid, were not automobile parts or accessories, that the law did not impose a tax upon their sale, and that the amounts paid as tax should be refunded.

If these decisions become final, refunds will be payable to the manufacturers who availed themselves of the privileges granted by the regulations and who collected the amounts from the purchasers. Many reputable automobile manufacturers have informed me that they do not intend to file claims for refund of amounts which they collected from the purchasers except in cases where they can pass the refund back to the purchasers, for obviously they would otherwise be unjustly enriched. • • •

It is my opinion that no refund should be made in these cases unless the manufacturer has filed, prior to the making of the refund, a statement under oath setting forth the names of the purchasers from whom he collected, and unless the manufacturer has agreed in writing with the Commissioner of Internal Revenue to distribute the refund to the purchasers. The Chairman of the Committee on Ways and Means and the Chairman of the Committee on Finance have informally approved this policy.

Accordingly, I am transmitting herewith a draft of a proposed provision to be added to the paragraph of the deficiency appropriation for refunding internal revenue taxes illegally collected, made pursuant to the estimate therefor transmitted by the President to the Speaker of the House of Representatives under date of December 10, 1926, and referred to your committee.

Very truly yours."

Articles by Geo. M. Wilmeth in 5 Nat. Income Tax Magazine, page 323 (Sept. 1927)—"The Limitations on the Refund of Excise Taxes."

APPENDIX C.

SECTION 424 OF THE REVENUE ACT OF 1928.

"SEC. 424. Refund of automobile accessories tax.

(a) No refund shall be made of any amount paid by or collected from any manufacturer, producer or importer in respect of the tax imposed by subdivision (3) of § 600 of the Revenue Act of 1924, or subdivision (3) of § 900 of the Revenue Act of 1921, or of the Revenue Act of 1918, unless either—

(1) Pursuant to a judgment of a court in an action duly begun prior to April 30, 1928; or

(2) It is established to the satisfaction of the Commissioner that such amount was in excess of the amount properly payable upon the sale or lease of an article subject to tax, or that such amount was not collected, directly or indirectly, from the purchaser or lessee, or that such amount, although collected from the purchaser or lessee, was returned to him; or

(3) The Commissioner certifies to the proper disbursing officer that such manufacturer, producer or importer has filed with the Commissioner, under regulations prescribed by the Commissioner with the approval of the Secretary, a bond in such sum and with such sureties as the Commissioner deems necessary, conditioned upon the immediate repayment to the United States of such portion of the amount refunded as is not distributed by such manufacturer, producer or importer, within six months after the date of the payment of the refund, to the persons who purchased for purposes of consumption (whether from such manufacturer, producer, importer, or from any other person) the articles in respect of which the refund is made, as evidenced by the affidavits (in such form and containing such statements as the Commissioner may prescribe) of such purchasers, and that such bond in the case of a claim allowed after February 28, 1927, was filed before the allowance of the claim by the Commissioner."